THE MATERIALS FOR ENGLISH LEGAL HISTORY[1]

A DISTINGUISHED English lawyer has recently stated his opinion that the task of writing a history of English law may perhaps be achieved by some of the antiquarian scholars of Germany or America, but that "it seems hardly likely that any one in this country [England, to wit] will have the patience and learning to attempt it[2]." The compliment thus paid to Germany and America is, as I venture to think, well deserved; but a comparison of national exploits is never a very satisfactory performance. It is pleasanter, easier, safer to say nothing about the quarter whence good work has come or is likely to come, and merely to chronicle the fact that it has been done or to protest that it wants doing. And as regards the matter in hand, the history of English law, there really is no reason why we should speak in a hopeless tone. If we look about us a little, we shall see that very much has already been achieved, and we shall also see that the times are becoming favourable for yet greater achievements.

[1] *Political Science Quarterly*, 1889.

[2] Charles Elton, *English Historical Review*, 1889, p. 155.

Let us take this second point first. The history of history seems to show that it is only late in the day that the laws of a nation become in the historian's eyes a matter of first-rate importance, or perhaps we should rather say, a matter demanding thorough treatment. No one indeed would deny the abstract proposition that law is, to say the least, a considerable element in national life; but in the past historians have been apt to assume that it is an element which remains constant, or that any variations in it are so insignificant that they may safely be neglected. The history of external events, of wars and alliances, conquests and annexations, the lives of kings and great men, these seem easier to write, and for a while they are really more attractive; a few lightly written paragraphs on "the manners and customs of the period" may be thrown in, but they must not be very long nor very serious. It is but gradually that the desire comes upon us to know the men of past times more thoroughly, to know their works and their ways, to know not merely the distinguished men but the undistinguished also. History then becomes "constitutional"; even for the purpose of studying the great men and the striking events, it must become constitutional, must try to reproduce the political atmosphere in which the heroes lived and their deeds were done. But it cannot stop there; already it has entered the realm of law, and it finds that realm an organized whole, one that cannot be cut up into departments by hard and fast lines. The public law that the historian wants as stage and scenery for his characters is found to imply private law, and private law a sufficient knowledge of which

cannot be taken for granted. In a somewhat different quarter there arises the demand for social and economic history; but the way to this is barred by law, for speaking broadly we may say that only in legal documents and under legal forms are the social and economic arrangements of remote times made visible to us. The history of law thus appears as means to an end, but at the same time we come to think of it as interesting in itself; it is the history of one great stream of human thought and endeavour, of a stream which can be traced through centuries, whose flow can be watched decade by decade and even year by year. It may indeed be possible for us, in our estimates of the sum total of national life, to exaggerate the importance of law; we may say, if we will, that it is only the skeleton of the body politic; but students of the body natural cannot afford to be scornful of bones, nor even of dry bones; they must know their anatomy. Have we then any cause to speak despondently when every writer on constitutional history finds himself compelled to plunge more deeply into law than his predecessors have gone, when every effort after economic history is demonstrating the absolute necessity for a preliminary solution of legal problems, when two great English historians who could agree about nothing else have agreed that English history must be read in the Statute Book[1]? In course of time the amendment will be adopted that to the Statute Book be added the Law Reports, the Court Rolls and some other little matters.

And then again we ought by this time to have learnt

[1] *Contemporary Review*, vol. XXXI. (1877–78), p. 824, Mr Freeman on Mr Froude.

the lesson that the history of our law is no unique phenomenon. For a moment it may crush some hopes of speedy triumph when we learn that, for the sake of English law, foreign law must be studied, that only by a comparison of our law with her sisters will some of the most remarkable traits of the former be adequately understood. But new and robuster hopes will spring up; we have not to deal with anything so incapable of description as a really unique system would be. At numberless points our mediaeval law, not merely the law of the very oldest times but also the law of our Year Books, can be illustrated by the contemporary law of France and Germany. The illustration, it is true, is sometimes of the kind that is produced by flat contradiction, teaching us what a thing is by showing us what it is not; but much more often it is of a still more instructive kind, showing us an essential unity of substance beneath a startling difference of form. And the mighty, the splendid efforts that have been spent upon reconstructing the law of mediaeval Germany will stimulate hopes and will provide models. We can see how a system has been recovered from the dead; how by means of hard labour and vigorous controversy one outline after another has been secured. In some respects the work was harder than that which has to be done for England, in some perhaps it was easier; but the sight of it will prevent our saying that the history of English law will never be written.

And a great deal has been done. It is true that as yet we have not any history of our whole law that can be called adequate, or nearly adequate. But such a work will only come late in the day, and there are

many things to be done before it will be produced. Still some efforts after general legal history have been made. No man of his age was better qualified or better equipped for the task than Sir Matthew Hale; none had a wider or deeper knowledge of the materials; he was perhaps the last great English lawyer who habitually studied records; he studied them pen in hand and to good purpose. Add to this that, besides being the most eminent lawyer and judge of his time, he was a student of general history, found relaxation in the pages of Hoveden and Matthew Paris, read Roman law, did not despise continental literature, felt an impulse towards scientific arrangement, took wide and liberal views of the object and method of law. Still it is by his *Pleas of the Crown* and his *Jurisdiction of the House of Lords* that he will have helped his successors rather than by his posthumous and fragmentary *History of the Common Law*[1]. Unfortunately he was induced to spend his strength upon problems which in his day could not permanently be solved, such as the relation of English to Norman law, and the vexed question of the Scottish homage; and just when one expects the book to become interesting, it finishes off with protracted panegyrics upon our law of inheritance and trial by jury. When, nearly a century later, John Reeves[2] brought to the same task powers which cer-

[1] *The History of the Common Law of England*, written by a learned hand (1713). There are many later editions.

[2] *History of the English Law* (4 vols., 1783–87). Originally the work was brought down to the end of Mary's reign; in 1814 a fifth volume dealing with Elizabeth's reign was added. An edition published in 1869 cannot be recommended.

tainly were far inferior to Hale's, he nevertheless achieved a much more valuable result. Until it is superseded, his *History* will remain a most useful book, and it will assuredly help in the making of the work which supersedes it. Reeves had studied the Year Books patiently, and his exposition of such part of our legal history as lies in them is intelligent and trustworthy; it is greatly to his credit that, writing in a very dark age (when the study of records in manuscript had ceased and the publication of records had not yet begun), he had the courage to combat some venerable or at least inveterate fables. Still his work is very technical and, it must be confessed, very dull; it is only a book for those who already know a good deal about mediaeval law; no attempt is made to show the real, practical meaning of ancient rules, which are left to look like so many arbitrary canons of a game of chance; owing to its dreariness it is never likely to receive its fair share of praise. Crabb's *History of English Law* is a comparatively slight performance[1]; it adds little if anything to what was done by Reeves.

But particular departments of law have found their

[1] George Crabb, *A History of English Law* (1829). George Spence, in the first volume of his *Equitable Jurisdiction of the Court of Chancery* (2 vols., 1846), has given a learned and valuable account of the development of the common law, perhaps the best yet given. In 1882–83, Ernest Glasson published his *Histoire du Droit et des Institutions de l'Angleterre*; but this does not go very far below the surface. Heinrich Brunner in Holtzendorff's *Encyklopädie* has published a most useful sketch of the French, Norman and English materials for legal history; the part relating to England has been translated into English by W. Hastie (Edinburgh, 1888); this translation I have not seen.

historians. What we call constitutional history is the history of a department of law and of something more —a history of constitutional law and of its actual working. For men of English race, constitutional history has long had an interest; they can be stirred by the politics of the past, for they are "political animals" with a witness. It would be needless to say that in this quarter solid and secure results have been obtained, needless to mention the names of Palgrave, Hallam, Stubbs, Gneist. Still, for modern times, much remains to be done. In relation to those times "constitutional history" but too frequently means a history of just the showy side of the constitution, the great disputes and great catastrophes, matters about which no one can form a really sound opinion who is not thoroughly versed in the sober, humdrum legal history of the time. But this work will certainly be done; the "general historian" will see more and more clearly after every attempt that he cannot be fair, that he cannot even be very interesting, unless he succeeds in reproducing for us not merely the facts but the atmosphere of the past, an atmosphere charged with law.

Again, other parts of the law have been submitted to historical treatment; in particular, those which in early times were most closely interwoven with the law of the constitution, criminal law[1] and real property law[2], while the history of trial by jury has a literature of its own and the history of some early stages in the de-

[1] James Fitzjames Stephen, *History of the Criminal Law* (3 vols., 1883); Luke Owen Pike, *History of Crime* (2 vols., 1873).

[2] Kenelm Edward Digby, *Introduction to the History of the Law of Real Property* (1875).

velopment of civil procedure has not been neglected[1]. But every effort has shown the necessity of going deeper and deeper. Everywhere the investigator finds himself compelled to deal with ideas which are not the ideas of modern times. These he has painfully to reconstruct, and he cannot do so without calling in question much of the traditional learning, without tracing the subtle methods in which legal notions expand, contract, take in a new content, or, as is sometimes the case, become hide-bound, wither and die. This task of probing and defining the great formative ideas of law is one that cannot be undertaken until much else has been done; it is only of late that the possibility and the necessity of such a task have become apparent, but already progress has been made in it. We are not where we were when a few years ago Holmes published a book which for a long time to come will leave its mark wide and deep on all the best thoughts of Americans and Englishmen about the history of their common law[2].

And here let us call to mind the vast work done by our Record commission, by the Rolls series, by divers

[1] Melville Madison Bigelow, *History of Procedure in England* (1880).

[2] O. W. Holmes, Jr., *The Common Law* (1882). *The History of Assumpsit*, by J. B. Ames (*Harvard Law Review*, April, May, 1888), is a masterly dissertation on some of the central ideas. In many articles in magazines, American and English, one may see a freer and therefore truer handling of particular themes of legal history than would have been possible twenty years ago; and the best text writers, though their purpose is primarily dogmatical, have felt the necessity of testing such history as they have to introduce instead of simply copying what Coke or Blackstone said.

antiquarian societies, towards providing the historian of law with new materials. Let us think what Reeves had at his disposal, what we have at our disposal. He had the Statute Book, the Year Books in a bad and clumsy edition, the old text-books in bad and clumsy editions. He made no use of Domesday Book; he had not the *Placitorum Abbreviatio*, nor Palgrave's *Rotuli Curiae Regis*; he had no Parliament Rolls, Pipe, Patent, Close, Fine, Charter, Hundred Rolls, no Proceedings of the King's Council, no early Chancery Proceedings, not a cartulary, not a manorial extent, not a manorial roll; he had not Nichols' *Britton*, nor Pike's nor Horwood's Year Books, nor Stubbs' *Select Charters*, nor Bigelow's *Placita Anglo-Normannica*; he had no collection of Anglo-Saxon "land books," only a very faulty collection of Anglo-Saxon dooms, while the early history of law in Normandy was utter darkness. The easily accessible materials for that part of our history which lies before Edward I have been multiplied ten-fold, perhaps twenty-fold; even as to later periods our information has been very largely supplemented. Where Reeves was only able to state a naked rule, taken from Bracton or the Statute Book, and leave it looking bare and silly enough, we might clothe that rule with a score of illustrations which would show its real meaning and operation. The great years of the Record commission, 1830 to 1840, the years when Palgrave and Hardy issued roll after roll, such years we shall hardly see again; the bill, one is told, was heavy; but happily the work was done, and there it is[1]. A curious memorial it may seem of the age of

[1] Yes, but by no means all of it is in print. The nation was

"the radical reform," of the time when Parliament, for once in a way, was really showing some interest in the ordinary, every-day law of the realm, and was wisely freeing it from its mediaeval forms. But in truth there is nothing strange in the coincidence; the desire to reform the law went hand in hand with the desire to know its history; and so it has always been and will always be[1]. The commencement in 1858 of the Rolls series is, of course, one of the greatest events in the history of English history, and in that series are now to be found not only most of our principal chronicles, but also several books of first-rate legal importance, Year Books never before printed and monastic cartularies. The English Historical Society published Kemble's collection of Anglo-Saxon charters, the Camden Society published Hale's *Domesday of St Paul's* and several similar works. More recently the Pipe Roll Society started with the purpose of "dealing with all national manuscripts of a date prior to 1200," and the Selden Society with the purpose of "printing manuscripts and new editions and translations of books having an important bearing on English legal history." Such work must chiefly be done in the old country, but it would be base ingratitude were an Englishman to forget that the Selden Society owes its very existence

attacked with one of its periodical fits of parsimony, and the consequence is that there exist volumes upon volumes of transcripts made by Palgrave or under his eye. Very possibly the commissioners were for a while extravagant, still it was hardly wise to stop a great work when the cost of transcription was already incurred. However, these transcripts will become useful some day.

[1] Some of the coincidences are very striking: thus "fines" were abolished in 1834; in 1835 the earliest fines were printed.